S T A T E O F M I C H I G A N

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the formal complaint of **B&S Telecom, Inc.** against **Michigan Bell Telephone Company (MBT) d/b/a AT&T** For section 601 penalties and remedies for Dailey Violations of sections 305, 352, 355, 502 (1), of the MTA	)))))))	Case No. U-16162

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on July 16, 2010.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before July 26, 2010, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before August 2, 2010. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for

Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Mark D. Eyster

Digitally signed by Mark D. Eyster
DN: cn=Mark D. Eyster, c=US, email=mdeyste@michigan.gov
Date: 2010.07.16 14:26:57 -04'00'

Mark D. Eyster
Administrative Law Judge

July 16, 2010
Lansing, Michigan
dmp

S T A T E O F M I C H I G A N

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the formal complaint of **B&S Telecom, Inc.** against **Michigan Bell Telephone Company (MBT) d/b/a AT&T** For section 601 penalties and remedies for Dailey Violations of sections 305, 352 , 355, 502 (1), of the MTA	) **)** **)**)))	Case No. U-16162

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

On December 17, 2009, B&S Telecom, Inc. (B&S) filed a complaint against AT&T that, among other things, requested an order from the Michigan Public Service Commission (Commission) compelling AT&T to renegotiate the Local Wholesale Complete contract (LWC) that the parties had signed in September, 2005. On December 23, 2009, the Commission returned the complaint, explaining that the complaint did not state a *prima facie* case because "[t]he Commission does not have jurisdiction over private contracts or forcing one company to contract with another." U-16162, Document No 4.

On January 8, 2010, AT&T notified B&S that, pursuant to the terms of the LWC, B&S had a past due balance of $222,677.06 and that service could be discontinued on January 21, 2010. On January 15, 2010, B&S filed an amended complaint. The amended complaint is very similar to the second amended complaint, discussed below,

upon which this case is being decided; the only significant difference being that the amended complaint requested emergency relief. On January 29, 2010, the Commission returned the amended complaint, explaining that the complaint did not state a *prima facie* case because:

> Unbundled Network Element – Platform (UNE-P) assumed the TELRIC rates. Those rates were found by the Federal Communications Commission (FCC) to be inconsistent with the promotion of competition. Thus, the FCC held that UNE-P need not be provided and established a transition period. The Commission has found CLECs no longer have a right under 47 USC 251(c)(3) to order UNE-P and noted that parties were free to negotiate market based contracts, without Commission approval or involvement. The contract at issue in your complaint appears to be one such commercial contract, the legality of which is affirmed by federal law which preempts the application of the Michigan statutes that you cite. The Commission has no authority to grant the relief you seek and therefore, your complaint does not meet the *prima facie* requirements. U-16162, Document No. 10.

After continued litigation by Complainant, on April 27, 2010, the Commission ordered that the amended complaint be docketed. On May 4, 2010, Complainant, B&S Telecom, Inc. filed its Second Amended Complaint. In response, on May 28, 2010, Respondent, AT&T, filed a motion to dismiss or, in the alternative, for summary disposition, under administrative rules 460.17323 and 460.17513. On June 8, 2010, oral arguments were heard. At that hearing, the complaint was suspended, until June 14, 2010, pursuant to MCL 484.2203(7). The parties filed motion briefs on June 18, 2010. Because the ruling on the motion disposes of the entire proceeding, this Proposal for Decision is being issued, pursuant to R 460.17323.

POSITIONS OF THE PARTIES

The Second Amended complaint contains the following common allegations:

12. Between March 11, 2006 until January, 2010, MBT/AT&T had been providing B&S with basic local exchange 2-wire analog loop and basic ports (both defined in MCL 484.2102), which Plaintiff re-sold as Plain Old Telephone business and residential service (POTS) on a wholesale basis to another licensed competitor in respondent's Service Areas in Michigan, in competition with MBT.

13. Since March 11, 2006, MBT/AT&T has been free to engage in the business of selling 2-wire analog loop service and switch ports at any price equal to or above the price determined for each such UNE element.

14. Such paragraph 12 activity is not prohibited conduct and does NOT violate any state or federal statute, rules, regulations or ordinances of local government as evidenced by the parties LWC agreement under which MBT/AT&T voluntarily offered and sold such loops and ports at the non-negotiated rates determined by MBT/AT&T therein.

15. However, the rates that MBT/AT&T charged B&S were rates that were dictated by MBT/AT&T on a take it or leave it basis that violate Sections 355 and 352 of the MTA as described below.

* * *

17. MBT/AT&T had/has a duty under MCL 484.2355 to break its network down "as a minimum" into "loop" and a "port" components and to price each component separately at Commission-determined rates and when same are sold, to allow B&S to purchase such components at such Commission-determined rates.

12. [sic] In Case no: U-13531, the Commission priced a loop in Service Area A at $9.13 per loop per month, Service Area B at $10.77, and Service Area C at $14.20. Therein, the Commission determined the basic port rate in all of respondent's Service Areas to be $3.46.

13. B&S contends that when priced separately that the legislature contemplated that a fully functional POTS residential or business telephone service for one combined pair of a loop and a port or (1) "line" is required to be billed to B&S in some format that is conceptually similar to (as an example):

One line (Service Area A): ……. $9.13
One port: ……. $3.46
Total cost for one line: ……. $13.59

14. Instead, respondent has been charged [sic] B&S until mid January, 2010 as follows: line 246-555-1313: …….. $29.37

21. [*sic*] The mandatory statutory provisions of MCL 484.2355 and 484.2352 (2) are not concerned what the historical relationship of the

parties or any reasons advanced by any ILEC for not strictly complying with their mandates. [*sic*]

* * *

23. B&S charges that for the time period at issue, the Commission had not established a rate under MCL 484.2355 and 484.2352 (2) for a UNE element rate for bundling such "loop" and "port" together into a single rate as reflected in MBT/AT&T's invoices. Such invoices are as summarized by Exhibit F-1 attached to the testimony of Vera Fuselier, and show that the average rate of $29.37 on a per "line" which is about double the charges if such invoices were billed at the individual rate for a "loop" or "port" as mandated by such provisions.

24. B&S alleges that respondent's rates as reflected in said past invoices do not match the mandate of such statutory provisions and are therefore unlawful, unenforceable and voidable by B&S at its option.

*** * ***

27. Furthermore, on January 11, 2010, MBT/AT&T sent Plaintiff a 10-day demand letter that demanded payment in full of such unlawful charges under penalty of disconnecting service on January 21, 2010.

* * *

30. Therefore to prevent such threatened disconnection, B&S acted reasonably to protect its end user customer's service and wrote in excess of one thousand orders, and moved its loops and ports from its Local Wholesale Complete Agreement, to the resale provisions under its Interconnection Agreement at an average per "line" cost increase of about $6.00 per month.

The Second Amended Complaint includes four counts alleging violations of the Michigan Telecommunications ACT (MTA). Count one alleges a violation of MCL 484.2352(2).[1] B&S alleges that "the rates that respondent has charged Plaintiff for the subject service do not conform to the rates established by the commission" and that "[s]uch rates violate section 352(2) of the MTA, which renders each and every invoice sent to plaintiff null, void, invalid, and of no legal effect. Second Amended Complaint, p. 6.

[1] MCL 484.2352(2) states: "The rates for network elements and combinations of network elements, unbundled loops, number portability, and the termination of local traffic shall be the rates established by the commission. "

Count II alleges that AT&T "has failed to allow B&S to purchase separately priced loop and ports since March 11, 2006" and, therefore, has violated MCL 484.2355[2]. Second Amended Complaint, p. 7.

Count III alleges a violation of MCL 484.2502(1)(a)[3] "by preparing and sending B&S invoices that violate law and then contending that such invoices were/are valid, accurate, and lawful when the same were not." Second Amended Complaint, p. 8.

In Count IV, B&S alleges that the Michigan Telecommunication Act "prohibits Respondent from charging rates for the subject service that have not been established by the Commission", "prohibits Respondent from bundling together loops and ports, and charging one price that is in excess of the addition of the individual prices of a loop and port, for both" and "prohibits Respondent from making representations about such rates that were/are false, misleading, or deceptive." Second Amended Complaint, p. 8. B&S claims that "Respondent has engaged in such prohibited acts by preparing and sending B&S invoices that violate law, and then contending that such invoices are valid, accurate, and lawful, and that non-payment of same will subject B&S to Respondent's collection activities, including, inter alia, disconnection of services for alleged non-

[2] MCL 484.2355 states:
"Sec. 355(1) A provider of basic local exchange service shall unbundle and separately price each basic local exchange service offered by the provider into the loop and port components and allow other providers to purchase such services on a nondiscriminatory basis.
(2) Unbundled services and points of interconnection shall include at a minimum the loop and the switch port."

[3] MCL.2502(1)(a) states:
"(1) A provider of a telecommunication service shall not do any of the following:
(a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive. As used in this subdivision, "material information" includes, but is not limited to, all applicable fees, taxes, and charges that will be billed to the end-user, regardless of whether the fees, taxes, or charges are authorized by state or federal law."

payment." Second Amended Complaint, p. 8. B&S asserts that such practices violate MCL 484.305(n).

At Second Amended Complaint, p. 11, B&S requests that the Commission order the following relief:

1. That AT&T pay for the economic loss incurred by B&S, resulting from the alleged violations of the MTA;
2. That AT&T be ordered to "refund to its ratepayers 20% of all sums that they have paid MBT/AT&T since March 11, 2006, which is the approximant [sic] amount that each such ratepayer has suffered by reason of such violations, due to lack of price competition in the land line POTS market";
3. Fine AT&T $40,000 per day per violation, and;
4. Award B&S attorney fees and costs.

As noted above, on May 28, 2010, AT&T responded to the complaint by filing a motion for summary disposition. In its motion, AT&T states that::

> [A]ll of B&S's claims are based on the same false factual predicate: that notwithstanding the FCC's TRRO order eliminating the availability of UNE local switching and UNE-P, and notwithstanding the Commission's multiple orders implementing the TRRO, and notwithstanding the contractual obligations – both under the parties' LWC contract and their interconnection agreement – B&S is entitled to obtain "UNE-P" or a "UNE-P" equivalent at TELRIC rates. That proposition is baseless." Mot for Sum Disp, p. 12.

AT&T asserts that, pursuant to the FCC's TRRO, "ILECs were not required to provide unbundled local switching, either alone or as part of UNE-P." Mot for Sum Disp, p. 12. AT&T continues by stating that the "FCC imposed a nationwide bar on UNE-P" and that the "TRRO is final and binding on the parties and the Commission. Accordingly, any

attempt to resurrect UNE-P under supposed state law authority would violate the Federal Telecommunications Act and the TRRO. " Mot for Sum Disp, pp. 12-13.

Next, AT&T argues that the Commission has already rejected B&S's claim. AT&T states that, in response to the TRRO, the Commission conducted extensive proceedings on the claim raised by B&S and that, in its March 29, 2005, order in consolidated Cases Nos. U-14303, U-14305, U-14327, and U-14463, the Commission found that CLECs could no longer order UNE-P. Mot for Sum Disp, p. 13. AT&T notes that, in Case No. U-14447, the Commission specifically mentioned the LWC as an alternative to replace UNE-P. Mot for Sum Disp p. 13-14.

Additionally, AT&T argues that the Commission lacks jurisdiction to void the LWC. As AT&T sees it, at Mot for Sum Disp, p. 14:

> B&S's Second Amended Complaint is predicated on the notion that B&S is 'entitled' to, in effect, retroactively void its LWC contract, including the contracted rate that it has paid (or at least agreed to pay) for years, and instead obtain UNE-P or a 'UNE-P-like' service at some unspecified Commission-approved rate under supposed state law authority, notwithstanding the FCC's TRRO decision and the Commission's prior decisions to the contrary.

AT&T cites the December 6, 2002, order, in Case No. U-13501, the October 23, 2003, order, in Case No. U-13789, and the September 18, 2007, order, in Case No. U-14962, for the proposition that the Commission "lacks jurisdiction over privately negotiated commercial contracts, such as the LWC contract." Mot for Sum Disp, pp. 14-15.

AT&T argues that, even if the Commission has jurisdiction to hear this claim, B&S has, nonetheless, failed to state a claim upon which relief can be granted. AT&T argues that "nothing in MTA Section 352 prohibits parties from entering into negotiated commercial agreements to provide telecommunication services." Mot for Sum Disp, p.

16. AT&T states that "[t]o the extent that B&S chooses . . . [to use] unbundled network elements, it is free to do so . . . under its interconnection agreement . . ., however, the availability of UNEs . . . does not preclude other methods of competition . . . such as the parties LWC agreement." Mot for Sum Disp, p. 16

Finally, AT&T argues that MTA sections 352 and 355 are preempted by the Federal Telecommunication Act (FTA) and the claims B&S makes in this case have already been decided in Cases Nos. U-14303, U-14305, U-14327, and U-14463.

On June 3, 2010, B&S filed a response to AT&T's motion to dismiss. B&S starts by stating, at B&S Response, pp. 1-2:

> The Commission established rates for AT&T's 2-wire analog loops and basic switch ports in Case no.: U-13531. Therein, such rates are found on pages 1 and 8, respectfully, of Docket no.: 561 [sic] (AT&T's compliance filing). Commencing in March, 2006, AT&T voluntarily and without any order or coercion of any third party, started to sell B&S such network elements. However, AT&T failed to charge the rates so established by the Commission. Instead, AT&T charged a bundled rate that averaged about $29.37 for one such loop with one such port. Until January, 2010, AT&T had sold B&S about 120,000 such elements. B&S did not challenge such rates because paragraph 5.4 of the agreement under which same were sold, contained a "doomsday clause" that allowed AT&T to, without notice, declare the contract to be in material breach, thereby allowing AT&T to disconnect all such loops and ports upon which B&S relied to provide POTS service to its customers. Such an action would have visited chaos, harm, and anger upon B&S's end user customers and destroyed B&S's business.
>
> AT&T's invoices do not provide any detail to establish how much of such $29.37 monthly recurring charge was attributed to the 2-wire analog loop service and how much to the port. AT&T's motion assumes (without coming forward with a positive assertion) that anything over the Commission's established rates for a 2-wire analog loop is related to the switch port. AT&T's motion argues (without expressly stating same) that it has no duty to sell B&S a switch port (ignoring the fact that it had done so some 120,000 times.
>
> Since AT&T's invoices fail to detail what portion of the monthly recurring charge applies to the switch port, the Commission is entitled to find that the switch port was free (or no more than the Commission established rate of $3.56 per month) and that the entire balance of the

> $29.37 was an overcharge for the 2-wire analog loop which AT&T freely admits that it has a duty to sell to its competitors.
>
> AT&T motion falsely asserts that B&S is asking the Commission to "resurrect UNE-P" and pretends that the Second Amended Complaint (SAC) is focused upon the future and seeks (when it does neither) the Commission to order AT&T to provide UNE-P.
>
> Fortunately, the Commission need not take AT&T's word for the content of the SAC. The SAC is in writing and exists for the Commission to read as Docket [sic] no.: 10. Upon such a reading, the Commission will learn that the SAC seeks for the Commission to make B&S whole by ordering AT&T to provide a refund to B&S for the difference between what AT&T charged B&S between March, 2006 and January, 2010 [*sic*]. Such requested relief is historical and not future.
>
> Left is the time period between January, 2010 and September 10, 2010 when the agreement under which AT&T provided such loops and switch ports expires. AT&T had/has a contractual duty to provide both until such end date. AT&T breached its duty by sending B&S a 10-day Notice of Discontinuance of Service (page 13 of Docket [*sic*] no.: 5) which reasonably caused B&S to move the affected service to the resale program defined in its interconnection agreement at a $6 per month higher cost than the $29.37 charge. B&S seeks to be made whole by the Commission ordering AT&T to reduce its resale charges to the average $14.80 charge that AT&T is statutorily obligated to charge B&S under MCL 484.3352 (2) and as reflected in said Docket no. [*sic*]: 561 in Case no.: U-13531.

B&S continues by stating that AT&T's argument regarding jurisdiction "is based upon the false argument that B&S is seeking the Commission to order AT&T to provide UNE-P" and that "AT&T does not like the words and sentences used by its competitor, so it conjures up false characterizations of B&S's complaint . . . ." B&S response, p. 15.

> AT&T's tactic represents an obvious attempt by AT&T to violate B&S's rights to a meaningful hearing before a fair and impartial decision maker. These are basic rights guaranteed by the due process clauses of both the Constitution of 1963 and the fifth and 14th amendment of the US Constitution. Procedural Due Process requires at a minimum fundamental fairness which includes a decision that is made on facts, not characterizations of facts or naked statements of counsel who are paid to obfuscate, equivocate, and confuse. B&S Response, p. 15.

Like AT&T, B&S cites Case No. U-14303, but, unlike AT&T, for the proposition that the Commission has rejected AT&T's preemption argument. B&S Response, p. 19.

B&S continues, at B&S Response, pp. 20-21:

> As previously stated, B&s [*sic*] has a procedural due process right to obtain a decision whether AT&T's past acts violate each statutory provision. Should the Commission follow AT&T's urgings would entitle B&S to re-file its action for Superintending Control as the Commission's representation that it would accept the First Amended Complaint and decide the issues plead therein would prove to have been hollow if not deceitful [*sic*].
>
> * * *
>
> The controlling issue in this case is whether such 120,000 combinations of loop and ports were sold at Commission established rates. There are only two (2) issues that are relevant to such a decision. The first is whether section 352 (2) means what it says. The second is a simple comparison of the invoices sent to B&S with the rates listed for 2-wire analog loops and ports listed on page 1 and 5 of docket no 561 in Case no. U-13531 [*sic*]. This is an exercise that AT&T does not want the hearing officer or the Commission to engage.

Continuing, B&S cites section 201(2) of the MTA and states, at B&S Response, pp. 24-25:

> There is nothing about enforcing Sections 352 and 355 of the MTA that is inconsistent with the FTA or the rules and orders of the FCC. Those sections do not mention UNE-P. The entire MTA fails to mention UNE-P. If there was an inconsistency, the Commission is duty bound to enforce the MTA as it has no power whatsoever to alter, modify, change or delete any provision of the MTA, which reflects the will of the legislature who created the MPSC.
>
> AT&T's entire 22-page motion is nothing but "lawyer's talk and puffing" on the irrelevant subject of UNE-P, the false claim of federal preemption, and that the act of enforcing MCL 484.3355 and 352 is inconsistent with federal law. Not a single sentence from the TRRO or other order or rule of the FCC is quoted to show that AT&T is prohibited from selling UNE-P at any price, including Commission-determined rates. To the contrary, what the TRRO did was to merely remove the obligation for AT&T to sell the service. AT&T sells under UNE-P by changing its name and calling it Local Wholesale Complete. A fact recognized annually by the Commission in its MTA-mandated report to the legislature on the status of competition in Telecommunications in Michigan.

The motion was heard on June 8, 2010. To more fully address the issue of federal preemption, the parties submitted supplemental briefs on June 18, 2010.

In its June 18 brief, AT&T first argues that MTA sections 352(2) and 355 are inapplicable to the LWC. AT&T states that "nothing in Section 352(2) purports to mandate TELRIC pricing for unbundled loops, network elements or combination of elements." AT&T Brief, p. 2. AT&T continues, at AT&T Brief, pp. 2-4:

> [T]he services provided . . . to B&S under its LWC agreement are not unbundled network elements. B&S ordered comprehensive LWC services as set forth in the parties' privately negotiated agreement. While these services were undoubtedly intended to replace the UNE-P line B&S formerly leased and shared some of their overall functional attributes, B&S did not order unbundled loops or other network elements from AT&T Michigan. It ordered LWC lines. It is not entitled to TELRIC pricing under the LWC agreement for services ordered under that agreement any more than it is entitled to TELRIC pricing or LWC pricing for resale basic local exchange lines it acquired under the resale provisions of its interconnection agreement.
>
> B&S complains that the LWC prices were not "established by the commission" as set forth in Section 352(2). Since the LWC agreement contemplates a comprehensive service, rather than merely the provision of unbundled loops or other network elements, Section 352(2) simply does not apply. Nothing in Section 352(2) purports to preclude parties from entering into voluntary private agreements – agreements expressly contemplated both by the FCC and by the Commission – let alone purports to give the Commission authority to set the prices under such agreements. Furthermore, the Commission explicitly permitted AT&T Michigan to charge the prices set forth in its LWC agreement to CLECs that failed to disconnect their UNE-P lines following the FCC-mandated transition following its nationwide bar on unbundling local switching . . . .
>
> * * *
>
> As with its argument concerning Section 352, B&S also ignores the fact that Section 355 applies to purchases of loop and port network elements. It does not apply to the comprehensive LWC services B&S ordered pursuant to the parties' privately negotiated 13 state agreement, nor does it apply to the resale local exchange services it subsequently ordered under the terms of the parties' Commission-approved interconnection agreement. B&S cannot argue that it is entitled to a rate structure applicable to something it did not order – a rate structure contrary to the parties' contracts.

In regard to Preemption, AT&T first reviews the FCC's 2005 TRRO. AT&T notes that, under the TRRO, the FCC ordered a nationwide bar to the requirement that ILECs

provide UNE-P and required CLECs to migrate from UNE-P within 12 months. AT&T further notes that, in its TRRO, the FCC approvingly referenced the existing privately negotiated commercial arrangement for the continued provision of UNE-P between AT&T (then SBC) and Sage Telecom and indicated that the transition mechanism did not effect this and similar commercial arrangements.

AT&T continues by stating, at AT&T Brief, pp. 8-9:

> Preemption occurs under three circumstances: 1) Where the federal act (or authorized agency order) expressly states that it preempts state law; 2) where the federal regulatory scheme is so pervasive it is said to "occupy the field" and 3) where there is a conflict between federal and state law. The Supreme Court has held,
>
> > A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Among other preemption arguments, AT&T argues that "state requirements that purport to expand ILEC unbundling requirements, as determined by the FCC, are preempted." AT&T Brief, p. 12. To support this proposition, AT&T cites *Illinois Bell Telephone Co v Box,* 548 F3d 607 (CA 7, 2008), *Verizon New England v Maine PUC*, 509 F3d 1 (CA 1, 2007), *Qwest v Arizona Corp Commission*, 567 F3d 1109 (CA 9, 2009), and *Verizon North v Strand*, 367 F3d 577 (CA 6, 2004). AT&T acknowledges that, in its March 29, 2005, order in Cases Nos. U-14303, U-14305, U-14327, and U-14463, the Commission indicated that it was not persuaded that it was preempted from

requiring ILECs to provide UNEs under the authority of the MTA, but that requiring the continued provision of UNE-P would be inconsistent with the FCC's TRRO. AT&T Brief, p. 13. However, AT&T argues that the Commission's finding of inconsistency forms the basis for finding preemption and that regardless, "since the Commission's 2005 decision, the law has become settled that state requirements that purport to require an ILEC to provide UNEs or use TELRIC pricing standards inconsistent with the FCC's carefully crafted regulatory regime are preempted." AT&T Brief, p. 14.

In opposition to AT&T's preemption argument, B&S starts by stating, at B&S Brief, pp. 1-2:

> The issue of preemption is a separate issue from whether the commission should exercise the authority, that it expressly has recognized that it has, under the MTA to order MBT/AT&T to unbundle additional UNE elements or to order MBT/AT&T to provide UNE-P. Whether or not the commission has declined in the past to order UNE-P under the MTA does not alter its jurisdiction or authority to do so.
>
> * * *
>
> B&S is not seeking for the Commission to order MBT/AT&T to provide the FCC defined UNE-P method of providing landline telephone service. B&S merely seeks for the Commission to enforce the clear and unequivocal mandate of section 355 of the MTA for MBT to unbundle its POTS service into at a minimum a loop and port components and to sell them to B&S at the rates required under section 352 (2) of the MTSA. The Commission does not have to make up any new duty. The duty has been imposed by the legislature. MBT/AT&T, being use [sic] to getting its way in the world, thumbs its nose at the legislature and says that its contract trumps state law. Nevertheless, its argument is fallacious and seeks to re-write history.

B&S finds support for its position in the "February 24 2005 Comments of MCI" in Case No. 14303 (Document No. 52). B&S adds, at B&S Brief, p. 4:

> In addition to the FCC's own pronouncements the commission referred [sic] the following Sixth Circuit Court of Appeals statements:
>
> > The Sixth Circuit has specifically approved of the Commission's actions under state law as not being

> preempted by federal law. "According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." *Michigan Bell Telephone Co. v. MCImetro Access Transmission***,** 323 F.3d 348, 359 (6th Cir.2003). The Sixth Circuit also stressed that "[w]hen Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection." *Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.,* 323 F.3d 348, 358 (6th Cir. 2003).[4]

Next B&S argues, at B&S Brief, p. 4, that:

> Docket no. 21 [sic][5] in this matter establishes that the Commission has already determined that the Second Amended Complaint makes out a prima facie case. By definition, a prima facie case, prevents the grant of a motion for summary disposition.
>
> * * *
>
> Staff attorneys are agents of the Commission and under agency law of actual and apparent authority, their acts and statements bind the Commission which means that the Commission has already determined this issue.

Next, B&S argues, at B&S Brief, p. 5, that:

> In *Lavene v Winnebago Industries,* 266 Mich App 470; 702 NW2d 652 (2005) the court of appeals stated that there is a *strong presumption* against preemption and to overcome this presumption the claiming party (MBT/AT&T) must prove 6 elements, none of which are present in this case. Specifically under the Michigan test (which the MPSC is obligated to follow) there is no room for an agency of the federal government to declare a Michigan statute to be preempted by orders, actions, or perceived authority of the FCC to administer the FTA. An FCC order is not a federal statute.
>
> * * *
>
> Preemption occurs only under certain conditions: (1) when a federal statute contains a clear preemption provision; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and

[4] B&S provides no citation for this quote and its accuracy has not been verified. The opinion in *Michigan Bell Tel Co v MCImetro Access Trans Servs, Inc,* 323 F3d 348 (CA 6, 2003) addressed whether a CLEC could fax change orders, under its interconnection agreement. The court found that it had jurisdiction to review whether the MPSC had correctly applied state contract law, that the MPSC had not acted arbitrarily and capriciously, and that the MPSC's interpretation of the interconnection agreement was not preempted by the FTA.

[5] In this case, Document No. 21 is an Interoffice Communication stating, "Complaint is Prima Facie; forward to: Telecommunications Division."

> state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Duprey, supra* at 665. (Emphasis supplied)
>
> If the six factor test in *Lavene v Winnebago Industries* were present, the MPSC would be out of the Telecommunications regulatory business.

Finally, B&S states, at B&S Brief, pp. 5-6, that:

> [T]he MPSC was not given the power by the legislature to declare the MTA or any provision of it to have been or to be preempted by federal law. . . .
>
> There are no clear and unmistakable words or language in the MTA that grant the MPSC such power. Since the MTA is unambiguous in its lack of conferring such power, the MPSC is not permitted to interpret the MTA but must apply it as it was written. . .
>
> AT&T seeks for the MPSC to exceed its jurisdiction and to enter a void order.[6]

DISCUSSION

Summary Disposition

Administrative Rule 460.17323[7] (R 323) provides for motions for summary disposition when there is no genuine issue of material fact or there has been a failure to

[6] However, during oral argument, counsel stated, at Tr 1, pp. 35-36:

> Now if it were preempted, then that's the order of this Commission, but it has jurisdiction to determine that. The argument that you don't have jurisdiction or this Commission doesn't have jurisdiction to make these determinations is absurd. It clearly has the ability to issue an order to decide the ultimate question: Was the statute preempted?

[7] R 460.17323 Summary disposition.

Rule 323. A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding. If the entire proceeding is disposed of, the presiding officer shall issue a proposal for decision. If only part of a proceeding is disposed of, the presiding officer may issue a partial proposal for decision.

state a claim for which relief can be granted. R 323 is the administrative equivalent of MCR 2.116(C)(8) and 2.116(C)(10)[8].

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999).
>
> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v. Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Under R 323, if the ruling on the motion for summary disposition disposes of the entire matter, the presiding officer must issue a proposal for decision.

Facts

There are no relevant factual disputes between the parties. The parties agree that AT&T and B&S entered into the LWC contract on, or about, September 7, 2005. The parties agree that there is nothing illegal about the LWC. The parties entered into the LWC agreement with no Commission involvement or approval. Since then B&S has availed itself of the services provided under the LWC and AT&T has billed for those services, all pursuant to the terms of the LWC. Both parties acknowledge that B&S has

[8] Rule 2.116(C) reads, in part: The motion may be based on one or more of these grounds, and must specify the grounds on which it is based: . . .
(8) The opposing party has failed to state a claim on which relief can be granted.
(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

a significant past due balance, again, pursuant to the terms of the LWC. The points of contention are not factual, but legal, i.e. B&S's arguments that, under the MTA, the Commission must, in essence, re-write the LWC in a manner that would erase B&S's past due balance and that AT&T should pay fines, costs, and other economic damages.

Analysis

I find that, for a number of reasons, the motion for summary disposition should be granted in favor of AT&T.

First, and foremost, I agree with AT&T that the Commission lacks jurisdiction to resolve this alleged contractual dispute related to the privately negotiated LWC; an agreement for which no Commission participation or approval was necessary or involved. See *Beaver Tile and Stone v SBC Michigan*, U-13886, Order Dismissing Complaint and Commencing a New Proceeding (December 18, 2003); *TDS Metrocom, LLC v SBC Michigan*, U-13789, Order Dismissing Complaint (October 23, 2003); *In the matter of the Application for Resolution of Dispute regarding Feature Group A Revenue*, U-13501, Order (December 6, 2002), and *In the matter, on the Commission's own motion, to revise the service quality rules applicable to telecommunications providers*, U-14962, Order Adopting Telecommunications Service Quality Rules, (September 18, 2007). B&S, seemingly, attempts to dodge this jurisdictional roadblock by suggesting that this is not a dispute about the LWC, but, rather, a dispute about the invoices produced in accord with the LWC's provision. I'm not persuaded.

Furthermore, for the sake of argument, if one were to assume the Commission has the authority to address this supposed dispute regarding the LWC, B&S has failed to state a claim for which relief can be granted. In this matter, the claims alleged by

B&S are unenforceable, as a matter of law, and no factual development can justify recovery. B&S alleges no breach of contract by AT&T. Rather, B&S asks the Commission to unlawfully rewrite a valid and unregulated contract, under which, the parties have conducted business for over four years. To justify this request, B&S presents what amounts to nothing more than a simplistic rehash of the arguments that were previously presented to and rejected by the Commission in Cases Nos. U-14303, U-14305, U-14327, and U-14463. See *In the matter of the Application of SBC Michigan*, U-14305, Initial Comments of the CLEC Coalition (December 22, 2004)[9]; *In the matter of the Application of SBC Michigan*, U-14305, Reply Comments of CLEC Coalition and Response in Opposition to the SBC Michigan Motion for Summary Disposition (January 18, 2005)[10]; *In the matter of the Application of Competitive Local Exchange Carriers*, U-14303, Application to Initiate Investigation, (September 30, 2004)[11]; *In the matter of the Application of Competitive Local Exchange Carriers*, U-14303, Reply Comments of CLEC Coalition and Response in Opposition to the SBC Michigan Motion for Summary Disposition (January 18, 2005)[12]. In those consolidated cases, while the Commission stated that, at that time, it was "not persuaded that it [was] preempted by either the federal act or the FCC's orders from requiring the ILECs to provide UNEs", it "note[d] that Section 201(2) of the MTA . . . requires Commission action to be consistent with the FTA and the FCC's rules and orders. Requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*." *In the matter on the Commission's own*

[9] E-Docket U-14305, Document No. 47.
[10] E-Docket U-14305, Document No. 56.
[11] E-Docket U-14303, Document No. 1.
[12] E-Docket U-14303, Document No. 47.

motion, U-14463, Order, p. 8, (March 29, 2005). The Commission further stated that the "parties may negotiate for provision of those same facilities and functions on a commercial market basis." *In the matter on the Commission's own motion*, U-14463, Order, p. 10, (March 29, 2005). In March 2006, that is just what B&S did by entering into the LWC contract with AT&T. Requiring the retroactive application of TELRIC based rates to the LWC contract would create inconsistencies between State law and the FCC's rulings; the same inconsistencies that, in 2005, the Commission identified and found unlawful under the MTA.

Since 2005, nothing has developed to alter the Commission's conclusion that, under the MTA, the requested relief is unlawful. However, in regard to federal preemption, the picture has become clear. In 2005, the Commission was "not pursued" that preemption applied. In the intervening years, it has become settled that federal preemption bars B&S's requested relief.

"[C]onflict preemption is found 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Qwest Corp v Arizona Corp Comm*, 567 F3d 1109, 1118 (CA 9, 2009). There is no question that, when a State attempts to unbundle and apply TELRIC rates to elements that the FCC has decided needs not be unbundled, the purported State regulation is preempted. In *Illinois Bell Tele Co v Box*, 548 F3d 607, 611 (CA 7, 2008) the court explained why such actions are not permitted. Substituting the parties in this case with the ones from Illinois that explanation reads as follows:

> [B&S] wants in effect to overrule the FCC's decision not to require additional unbundling at the incumbent local exchange carrier's cost. It would not be physically impossible for [AT&T] to comply with both federal and state law; it's not as if the FCC wanted [AT&T] to use copper cable

> and the state plastic cable. But it would be contrary to the FCC's interpretation and application of federal law. The FCC has been charged by Congress with determining the optimal amount of unbundling-enough to enable carriers like [B&S] to compete with [AT&T] but not so much as to enable them to take an almost free ride on services that [AT&T] has spent a lot of money to create. That judgment, which is certainly within the power of the federal government to make, is without force if a state can require more unbundling at cost than the FCC requires.

B&S's requested relief would require the Commission to establish obstacles to the accomplishment and execution of the full purposes and objectives of Congress. Thus, any authority that the Commission might have to retroactively apply TELRIC based rates to, what amounts to, UNE-P is preempted by federal law[13]. To grant B&S's request would require unlawful conduct by the Commission. See *Ill Bell Tele Co v Box*, 548 F3d 607 (CA 7, 2008); *Qwest Corp v Arizona Corp Comm*, 567 F3d 1109, 1118 (CA 9, 2009); *Ill Bell Tele Co v Box*, 526 F3d 1069, (CA 7, 2008); *Bellsouth Telecom, Inc v Ky Pub Service Comm*, ___ F Supp 2d ___ (ED KY, 2010); *Ill Bell Tele Co v*

[13]At oral argument, counsel all but admitted this claim is barred by the preemption doctrine as evidenced by the following colloquy, at Tr 1, pp. 37-39:
JUDGE EYSTER: What about the Commission's statement that I read to you earlier with regards to continued provision, requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan?
MR. YUILLE: We're not asking for that relief, Judge, so it doesn't apply. We're not asking for UNE-P, and we're not asking them to order. At the end of the case there's nothing in our Complaint --
JUDGE EYSTER: Wait a minute. You just indicated to me that the LWC was UNE-P with, you know, dressed up, a little lipstick on it, okay. I think that's the way you phrased it.
MR. YUILLE: Uh-huh.
JUDGE EYSTER: And you're asking that TELRIC rates be applied to that and that you essentially receive a reimbursement of fees that have been paid or may not have been paid over the past four some odd years?
MR. YUILLE: That is correct.
JUDGE EYSTER: Okay. So how's that different from requiring provision of UNE-P?
MR. YUILLE: They voluntarily provided what they provided.
JUDGE EYSTER: Okay.
MR. YUILLE: You don't have to order them to do what they've already done. We're not talking prospective here. They did it. And the issue, the only issue is: Were the rates charged in compliance with the statute, their statutory duty?
JUDGE EYSTER: Okay. But now the FCC indicated that the rates you're requesting were not required, correct?
MR. YUILLE: Under federal law.
JUDGE EYSTER: Okay. And the Commission has said that it's not going to require --
MR. YUILLE: At that time.

Hurley, unpublished memorandum and opinion of the US District Court ND, issued Jan 28, 2008 (Docket No 05 C 1149); *Bellsouth Telecom, Inc v Ga Pub Service Comm*, 587 FSupp2d 1258 (ND Ga, 2008); *Mich Bell Tele Co, Inc v Lark*, 373 F Supp 2d 694 (ED Mich, 2005); *Verizon New England, Inc v Me Pub Utilities Comm*, 509 F3d 1 (CA 1, 2007), and; *United States Telecom Assn v FCC*, 360 US App DC 202 (2004).

Sanctions

In its motion for summary disposition, AT&T requests sanctions against B&S, pursuant to MCL 484.2209, which reads, in part:

> Sec. 209. (1) If the commission finds that a party's position in a proceeding under this act was frivolous, the commission shall award to the prevailing party the costs, including reasonable attorney fees, against the nonprevailing party and their attorney.
> (2) As used in this section:
> (a) "Frivolous" means that at least 1 of the following conditions is met:
> (i) The party's primary purpose in initiating the proceeding or asserting the defense was to harass, embarrass, or injure the prevailing party.
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were true.
> (iii) The party's legal position was devoid of arguable legal merit.

Under the standards, stated above, AT&T argues that this matter is frivolous. AT&T argues that B&S "is or should be aware that the Commission has consistently – and correctly – taken the position that it lacks jurisdiction over private contracts, such as the parties' LWC agreement." AT&T Mot for Summ Disp, p. 19. As evidenced by the testimony of Mr. Saul Anuzis, AT&T argues that "B&S was also clearly aware that the underlying claim – that it was entitled to obtain TELRIC cost-based UNE-P – something prohibited by both the TRRO and the Commission's orders . . ., was utterly devoid of merit." AT&T Mot for Summ Disp, p. 19. AT&T notes that this claim was previously

rejected in Cases Nos. U-14303, U-14305, U-14327, U-14463, and U-14447.[14] AT&T adds, at AT&T Mot for Summ Disp, pp. 20-21, that:

> In the face of the Commission's emphatic rejection of the very claims asserted by B&S and its failure to provide any contrary authority from any court or regulatory agency anywhere in the country, it is beyond dispute that B&S's position in this proceeding is "devoid of arguable legal merit."
>
> Not only is B&S's Second Amended Complaint devoid of arguable legal merit, its filings in this proceeding make it clear that B&S's primary purpose in instigating this proceeding is to harass AT&T Michigan. . . .
>
> This proceeding is simply an attempt by B&S to continue to avoid paying its bills and further injure AT&T Michigan. When B&S incurred more than $350,000 in overdue LWC charges, it transferred all of its LWC services to resale services under the parties' interconnection agreement to avoid disconnection. It now owes AT&T Michigan an additional $300,000 for resale invoices, which it apparently has no intention to pay. Its motives are clear. It has filed this frivolous proceeding simply to avoid or delay paying legitimate charges owed to AT&T Michigan.

On June 18, 2010, AT&T filed an affidavit and exhibits to supports its claim for over $42,500 in costs. (See U-16162, Document No. 33.)

B&S also makes a claim for sanctions, and states, at B&S Response to Motion, p. 29:

> [T]he Commission should dismiss AT&T's motion and award B&S sanctions for filing a frivolous motion that is based entirely on misrepresentations and mischaracterizations of fact and law. B&S has been put to the time-consuming task of responding to phantom issues. AT&T's motion meets the definition under Section 209 (2) for frivolous, quoted on page 18 of AT&T's motion

I find no merit to B&S's claim and grant the motion for summary disposition. By all appearances, this action appears designed, not as a good faith effort to change the law, or as B&S might argue, to apply the law as written, but as a last ditch effort to avoid

[14] During oral argument, B&S's counsel, Mr. Youlle, stated, "We weren't a party in those cases, and we're not bound by what the Commission said." Tr 1, p. 40. While it appears correct that B&S was not a party to these cases, Quick Communications, Inc was. Mr. Youlle is the President of Quick Communications, Inc. and, along with witness Anuzis, its co-founder.

payment of several hundred thousand dollars of overdue bills. I leave to the Commission the determination as to whether this matter is frivolous and whether the award of costs is required.

CONCLUSION

For the reasons stated above, the motion for summary disposition is granted.

Any arguments not specifically addressed in this Proposal for Decision are deemed irrelevant to the findings and conclusions of this matter.

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Mark D. Eyster

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Mark D. Eyster
Administrative Law Judge

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